Borneo Housing Mortgage Finance Bhd v Mygal bin Gibie & Anor

HIGH COURT (SANDAKAN) — SUIT NO TSC (52) 48 OF 2002
LINTON ALBERT JC
9 MARCH 2004

Limitation — Accrual of cause of action — When cause of action accrued — Whether on last payment date or date of acknowledgment of debt or auction date — Whether action statute-barred — Sabah Limitation Ordinance (Cap 72) Items 95, 101 and s 19(1)

This was an appeal by the appellant/plaintiff ('the appellant') against the decision by the sessions court judge in dismissing its claim. The respondent/defendant ('the respondent') had purchased a shop lot ('the property') and the purchase was financed by the appellant. The loan was for a sum of RM45,000 and was secured by an agreement dated 21 December 1985 ('the loan agreement'). The building of the property was not completed and ultimately abandoned. The appellant released the loan partially up to RM31,500 and the total repayment made by the respondent was RM31,432. The appellant refused to waive the interest on the loan sum amounting to RM82,203.84 calculated up to 31 December 2001. The property was auctioned off by the appellant on 24 February 2000 and the net proceeds totalling RM46,413.07 was retained by the appellant. The appellant filed this suit on 13 March 2002 to recover the balance sum of RM37,290.83 due and owing under the loan agreement as at 31 December 2001.

The issues before this court were: (a) whether the cause of action accrued on 30 October 1991 (ie the last payment date) or on 21 August 2000 and 7February 2002 (ie date of acknowledgement of debt) or 24 February 2002 (ie auction date); and (b) whether the appellant's action was statute-barred.

Held, dismissing the appeal with costs:

(1) Section 19(1) of the Sabah Limitation Ordinance (Cap 72) ('the SLO') provides, *inter alia*, that an acknowledgement of liability by way of writing before the expiration of the prescribed period for a suit in respect of any property or right, a new period of limitation according to the nature of the original liability shall be computed from the date of the acknowledgment. Since both letters dated 21 August 2000 and 7February 2002 constituted the respondents' acknowledgement of liability after the expiry of the prescribed period of six years from the last payment date, s 19(1) of the SLO was of no assistance (see paras 5 and 6).

(2) The loan agreement was clearly not a charge. The fact that the loan agreement empowered the appellant to sell and assign the property and apply the proceeds of sale towards the settlement of the loan did not convert the loan into money charged upon immovable property, pursuant to Item 101 of the SLO which prescribed 12 years as the limitation period (see para 7).

(3) Clause 8 of the loan agreement provided concurrent enforcement of remedies. Therefore, the appellant could elect to sue the respondents, or sell the property simultaneously or successively. However, the appellant chose to enforce its remedies successively and ultimately rue with the consequences because in its preoccupation with and misapprehension of the effect of the sale of property, the cause of action against the respondents had become statute barred (see para 9).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu/plaintif 'perayu' terhadap keputusan hakim mahkamah sesyen yang menolak tuntutan perayu. Responden/defendan ('responden') telah membeli sebuah rumah kedai ('harta tersebut') dan pembelian tersebut telah dibiayai oleh perayu. Jumlah pinjaman adalah sebanyak RM45,000 dan diperolehi melalui satu perjanjian bertarikh 21 Disember 1985 ('perjanjian pinjaman tersebut'). Pembinaan hartanah tersebut tidak disiapkan dan akhirnya telah terbengkalai. Perayu telah melepaskan sebahagian pinjaman yang berjumlah RM31,500 dan jumlah pembayaran balik yang telah dibuat oleh responden adalah RM31,432. Perayu enggan mengenepikan kadar faedah yang dikenakan di atas pinjaman tersebut yang berjumlah RM82,203.84 yang dikira sehingga 31 Disember 2001. Harta tersebut telah dilelong oleh perayu pada 24 Februari 2000 dan hasil jualan lelong tersebut yang berjumlah RM46,413.07 dipegang oleh perayu. Perayu memfailkan tindakan ini pada 13 Mac 2002 untuk menuntut baki jumlah sebanyak RM37,290.83 yang kena dibayar sehingga ke tarikh 31 Disember 2001.

Isu-isu di hadapan mahkamah ini adalah: (a) sama ada kausa tindakan bermula pada 30 Oktober 1991 (iaitu tarikh pembayaran akhir) atau pada 21 Ogos 2000 dan 7 Februari 2002 (iaitu tarikh perakuan hutang) atau 24 Februari 2002 (iaitu tarikh lelong); dan (b) sama ada tindakan plaintif dihalang oleh statut.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 19(1) Ordinan Hadmasa Sabah (Bab 72) ('OHS') memperuntukkan antara lain bahawa perakuan liabiliti menerusi surat, sebelum tamat tempoh untuk membawa sesuatu tindakan berkenaan sesuatu harta atau hak, tempoh hadmasa yang baru berdasarkan sifat liabiliti asal hendaklah dikira dari tarikh perakuan libiliti tersebut. Memandangkan kedua-dua surat bertarikh 21 Ogos 2000 dan 7 Februari 2002 merangkumi perakuan liabiliti oleh responden selepas tamat tempoh enam tahun dari tarikh pembayaran akhir, maka s 19(1) OHS adalah tidak membantu (lihat perenggan 5 dan 6).

(2) Perjanjian pinjaman tersebut bukan merupakan gadaian. Fakta bahawa perjanjian pinjaman memberi kuasa kepada perayu untuk menjual dan serahhak harta tersebut dan menggunakan hasil jualan terhadap penyelesaian pinjaman tersebut tidak menukar pinjaman tersebut kepada wang yang digadaikan ke atas harta tak alih mengikut Butiran 101 OHS tersebut yang memperuntukkan 12 tahun sebagai had masa (lihat perenggan 7).

(3) Klausa 8 perjanjian pinjaman memperuntukkan perlaksanaan remedi-remedi secara bersama. Maka, perayu boleh memilih untuk mendakwa responden atau menjual harta tersebut secara serentak atau berturut-turut. Akan tetapi, perayu telah memilih untuk menguatkuasakan remedi-remedinya secara berturut-turut dan kesudahannya menyesal dengan akibatnya kerana perkara yang memenuhi fikiran perayu bersama-sama kesalahfahaman perayu adalah penjualan harta tersebut natijahnya, kausa tindakan terhadap responden telah dihadkan oleh statut (lihat perenggan 8).]

Notes

For cases on the accrual of cause of action generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2077–2087.

Cases referred to

China & South Sea Bank Ltd v Tan [1989] 3 All ER 839 (refd)
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10 (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (distd)
Nadefinco Ltd v Kevin Corporation Sdn Bhd [1978] 2 MLJ 59 (refd)
Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328 (refd)
Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan [1984] 2 MLJ 1 (refd)
Sarawak Securities Sdn Bhd v William Leong Wai Ling & Ors [2002] 1 MLJ 294 (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (distd)

Legislation referred to

Limitation Ordinance 1953 s 26(2)
Sabah Limitation Ordinance (Cap 72) s 19(1)

Jeyan Marimuttu (J Marimuttu & Partners) for the plaintiff.
Amin Jaafar (Amin Jaafar & Co) for the defendant.

Linton Albert JC:

[1] I had on 10 February 2004 dismissed the appellant's appeal against the decision of the learned sessions court judge and now give the reasons therefore.

[2] The respondent had purchased a shop lot ('the property') from one United Lands Sdn Bhd ('the developer'). The purchase of the property was financed by obtaining a loan from the appellant. The loan was for a sum of RM45,000 and was secured by an agreement dated 21 December 1985 ('the loan agreement') between the appellant and the respondent. The respondent did not get the property because it was part of a project which the developer could not complete and ultimately abandoned. The loan was only partially released up to RM31,500 and the total repayment made by the respondent was RM31,432, only RM68 short of the amount disbursed

by the appellant. The interest on the loan was, however, another matter and it amounted to RM82,203.84 calculated up to 31 December 2001. The property was auctioned off by the appellant on 24 February 2000 and the net proceeds amounting to RM46,413.07 was retained by the appellant to account for the amount still outstanding and despite that a sum of RM37,290.83 was still owed by the respondent to the appellant as at 31 December 2001. The appellant refused to waive any part of the interest it had calculated in accordance with the loan agreement and accordingly commenced proceedings to recover the whole amount of RM37,290.03 on 13 March 2002.

[3] By cl 7 of the loan agreement, it was stipulated that in the event the respondents:

> 1) make default in payment of any one or more of the instalments or any interest thereon or other sums or moneys (whether principal or interest) herein agreed or covenanted by the Borrower to be paid … then and in any of such cases the Loan and any interest thereon and all other sums or moneys (whether principal or interest) for the time being owing under this Agreement shall immediately become payable by the Borrower to the Company and the Company shall forthwith become entitled to recover the same with interest thereon at the prescribed Rate and to exercise the rights and powers upon default herein this Agreement and by law provided without any previous notice to or concurrence on the part of the Borrower.

[4] Clause 8 which provided for the concurrent enforcement of remedies was as follows:

> Upon default by the Borrower in the manner in Clause 7 hereinbefore provided the Company shall be entitled to exercise all or any of the rights and powers following:
>
> 1) …;
> 2) …;
> 3) the right and power to sell and assign the said Property as the absolute unencumbered owner thereof at such price or prices and in such manner as the Company shall in its absolute discretion think fit free from any interest of the proceeds of sale in or towards the satisfaction of the Loan and all principal and interest and other moneys due to the Company hereunder and all costs of and occasioned by such sale or sales and the Company shall only pay to the Borrower the balance of the proceeds of such sale or sales if any after deduction of such principal and interest and other moneys aforesaid.

[5] Learned counsel for the respondents, Amin Jaafar, submitted that the appellant's action was statute barred. The last payment made by the respondents to the appellant which was not disputed, was on 30 October 1991. It was, therefore, argued that there was a breach of the loan agreement by the respondents immediately thereafter and that time also began to run concurrently from the breach. Learned counsel relied on Item 95 of the Sabah Limitation Ordinance (Cap 72) which states that the limitation period for the breach is six years and time begins to run when the contract is broken. There was, of course, no controversy as to the loan agreement being a contract in writing and so it was argued that the action commenced by the appellant on 13 March 2002 was well beyond the limitation period

of six years. Jeyan Marimuttu, learned counsel for the appellant, disagreed by emphasizing on the undisputed fact that the respondents had by virtue of two letters written by their solicitors dated 21 August 2000 and 7 February 2002 respectively acknowledged their liability to the appellant and, therefore, the application of s 19(1) of the Sabah Limitation Ordinance (Cap 72) would render the appellant's action well within the period of six years imposed by Item 95 thereof. Section 19(1) of the Sabah Limitation Ordinance (Cap 72) reads as follows:

> (1) If before the expiration of the period prescribed for a suit in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

[6] The Privy Council case of *Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1 was cited by learned counsel for the appellant. It was held in that case, as the Federal Court did, in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 that an acknowledgment of a statute barred debt constituted the accrual of the right of action to recover the debt. With respect, I do not think that these two cases are of any assistance to the appellant. Apart from the fact that they both relate to the Limitation Ordinance 1953 which does not apply to Sabah (see *Sarawak Securities Sdn Bhd v William Leong Wai Ling & Ors* [2002] 1 MLJ 294). Section 26(2) of the Limitation Ordinance 1953 which was the specific provision considered in those two cases is not *in pari materia* with s 19(1) of the Sabah Limitation Ordinance (Cap 72). Section 26(2) of the Limitation Ordinance 1953 reads as follows:

> … where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment

[7] I respectfully agree with the submission of learned counsel for the respondents that s 19(1) of the Sabah Limitation Ordinance (Cap 72) was of no assistance to the appellant because the letters which constituted the respondents' acknowledgement of liability was after the prescribed period of six years had expired. I do not hesitate also to reject the appellant's contention that Item 101 of the Sabah Limitation Ordinance (Cap 72) which prescribes 12 years as the limitation period is applicable. The loan agreement is clearly not a charge and, therefore, Item 101 does not apply. The fact that the loan agreement empowers the appellant to sell and assign the property and apply the proceeds of sale towards the settlement of the loan do not convert the loan into money charged upon immovable property within the meaning of Item 101.

[8] Mr Jeyan Marimuttu also submitted that time only runs after the successful auction of the property on 24 February 2002 which makes the appellant's cause of action well within Item 95 of the Sabah Limitation Ordinance (Cap 72). Learned counsel for the appellant relied on cl 8 of the loan agreement, which is reproduced above, read with cl 15 which is as follows;

A If the amount realized by the Company on a sale of the said Property in pursuance of Clause 8(3) hereof is less than the amount due to the Company the Borrower shall pay to the Company the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the prescribed Rate with yearly rests.

[9] It was argued, therefore, that only after invoking cls 8 and 15 of the
B loan agreement, could the appellant calculate and ascertain the amount of debt due from the respondents to the appellant. There is no merit in this argument. The loan agreement provided for the concurrent enforcement of remedies. The appellant could, therefore, elect to sue the respondents or sell the property simultaneously or successively (see *China & South Sea Bank Ltd v Tan* [1989] 3 All ER 839). Here, the appellant chose to enforce its remedies
C successively and ultimately rue the consequences because in its preoccupation with and misapprehension of the effect of the sale of the property, the cause of action against the respondents had become statute barred. In *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328, an authority cited by learned counsel for the respondents, the Court of Appeal held that for the purpose of limitation, time began to run from the earliest time at which a
D creditor could have brought an action. In *Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 the Federal Court rejected the proposition by the creditor that time began to run from the date of the winding up of the debtor and held that the cause of action accrued the instant the debtor failed to pay the first instalment due to the creditor and the action was barred by limitation because the action was commenced more than six years after the cause of
E action arose. I also agree with the contention of learned counsel for the respondents that *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 and *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 cited by the appellant's counsel ought to be distinguished. In *Loh Wai Lian* the purchaser could not successfully maintain that the vendor's action was statute barred because there was an express contractual obligation to
F pay a single sum which could not become due, because it could not be ascertained, until the occurrence of the event stated in the contract. Similarly in *Sia Siew Hong*, the lender's cause of action against the borrower on the contract of indemnity did not begin to run until after the property under a third party charge had been disposed of in order to ascertain the amount of loss the lender was entitled to recover from the borrower.

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[10] Having conclusively found that the learned sessions court judge was correct in deciding that the appellant's action was statute barred, I do not think I need to fortify my reason for dismissing the appeal by proceeding to determine whether the learned sessions court judge was also correct in his finding that the appellant had been guilty of inordinate and unreasonable
H delay in enforcing its remedy. I had, therefore, for the reasons set out above affirmed the decision of the learned sessions court judge and accordingly dismissed the appeal with costs.

Appeal dismissed with costs.

I Reported by Sugandra Rao